No. 96.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

W. I. BIDDLE, WARDEN OF THE UNITED STATES PENITENTIARY AT LEAVENWORTH, KANSAS, APPELLANT,

VS.

ISADORE LUVISCH, APPELLEE.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF APPELLEE.

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CITATIONS.

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The questions treated of in this reply brief filed pursuant to leave of court are:

(1) In *habeas corpus* can the fact that no offense known to the law—that is a colorless or impossible offense under the law—be considered?

(2) Does such an indictment invest the trial court with jurisdiction to sentence petitioner?

(3) Is a judgment of five years imprisonment rendered on such an indictment charging a colorless and

an impossible offense under the law void or merely erroneous?

These questions have never been *decided* by this court so far as we know.

(a)

Lack of jurisdiction is not confined to any one cause. Lack of jurisdiction may arise from any one of a variety of entirely different causes. It may result from the illegal organization of a court; exercise of jurisdiction in excess of that granted by law; from lack of an indictment where one is required; or, as in this case, where the act charged in the indictment is an absolutely innocent act that is a colorless and impossible offense under the law, which is the same as though no indictment whatever existed. The law-making body has not invested the court with power to punish innocent acts or colorless and impossible offenses but only to punish what is a crime and, no matter how formal the indictment or particular the trial, yet, if the act charged be innocent and constitute no crime whatever, or is a colorless and impossible offense all the formality is for naught, the prisoner is confined without lawful authority, the judgment is void and the court has acted entirely without jurisdiction. It has no power—no jurisdiction—to punish one for an innocent act or for a colorless and impossible offense.

An attempt has been made to confound this case with those cases where acts made an offense by law have been imperfectly or insufficiently charged. In all such cases where habeas corpus has been asked, the courts

have properly applied the rule that, if the trial court had jurisdiction of the class of offenses charged, that it was a question for such court to determine whether or not the act charged was sufficiently and legally charged.

But in such a case as this, it is no answer to say that the judgment cannot be attacked because rendered in a case of a class over which the court has jurisdiction. It must be apparent that, where the act charged constitutes *no offense*, then the indictment does not charge one of a *"class of offenses,"* of which the court has jurisdiction —*"no offense,"* cannot be one of a *"class of offenses."* The case cannot be one of a *"class of offenses"* because the court has no power to punish in a class of cases, where the acts done are innocent. Because some prosecutor or pleader conceives that what is, in reality, an innocent act under the law, or a colorless and impossible offense, is a crime and a violation of some particular statute, does not make the act fall within the *"class of cases"* condemned by the particular statute. It still remains an innocent act and does not fall within any *"class of crimes."* It is impossible for it to be otherwise. The *"class of cases"* over which the court has jurisdiction can never be broader than those acts which do, as a matter of fact, constitute a violation of the law. Any other act falls without the class.

The result in such case is that the court *has no jurisdiction of the subject-matter.* Such lack of jurisdiction is relieved against in habeas corpus. Simply to denominate innocent acts or colorless and impossible offenses, crimes does not make them so.

(b)

We quote a few of the decisions of state courts and statements of text writers precisely in point to show the court our contentions are supported by authority and reason.

In re Joseph Siegel, 263 Missouri, 375, it is said:

> "Petitioner asserts that there is no law which denounces as a crime his act in voting more than once in the before-mentioned municipal election and that, therefore, he is entitled to his discharge. We will consider this insistence first, for if it be true that the acts, of which petitioner was convicted, are not denounced as a crime by any law in force in this state, *then his confinement is unlawful notwithstanding his plea of guilty* to the information preferred against him."

In *Ex parte Maier,* 103 Cal. 476, it is said:

> "Petitioner asked for his discharge on habeas corpus upon the ground that the compalint does not state a public offense, and if that be true, there is no question but that he is entitled to his discharge in this proceeding."

Judge Church in his work on Habeas Corpus, Second Edition, Sec. 245, states the law as follows:

> "Inquiry may go to whether the indictment charges any offense. While inquiry cannot extend beyond an indictment into fields of unknown facts, the indictment itself may be examined upon habeas corpus, although it appears that the defendant has been detained to answer it under a commitment in due form. The court, or judge of the court where-

in such indictment is pending, may proceed to inquire whether it charges any offense known to the law, for *this goes to the jurisdiction,* which is always a proper subject of inquiry in a proceeding of this character. *If such were not the case, the simple warrant of a court, however arbitrary it might be, would constitute a complete answer to the writ.* An indictment must contain the statement of an offense known to the law, and, under the rules well settled by judicial decision this may be inquired into, if the court or judge determines, that it does not, the prisoner must be discharged as a matter of right."

In a note to the above section it is stated:

"A court can punish for no act except what is made criminal by law; it has no power to punish for something unknown to the law. It has jurisdiction to try and punish only for certain offenses, and those must be made criminal by law. If an indictment shows no offense, there is no criminality shown, and *there is nothing of which a court can take jurisdiction.* And if a court have no jurisdiction its action is void—a condition which it is the very object of habeas corpus to cure. Voidable informalities or irregularities are not reached by it, but fatal jurisdictional defects are ever within its range, either before or after indictment, and even after conviction and judgment."

In 12 R. C. L. pages 1190 and 1203, the following statements are made:

"The statement of some offense known to the law is *essential to the jurisdiction of the court* and is, therefore, a fact which may be inquired into on habeas corpus, and if it appears from the face of the indictment, information or complaint that it fails to state a crime, detention thereunder may be

relieved against, *as being without, jurisdiction.*

* * * * * *

"Thus, it has been held that when the facts charged or attempted to be charged, do not constitute any public offense, the defendant will be discharged, as *this goes to the jurisdiction of the court.*"

In *Ex Parte Rickey,* 100 Pac. 134 (Supreme Court of Nevada), it is said:

"Suffice it to say that where as in the petition in this case it is claimed upon the part of petitioner that the indictment does not allege an offense known to the law and it is admitted by the state that the true facts are stated in the indictment, it becomes the duty of the court to consider the question thus presented. *And if the facts so alleged and admitted as complete do not constitute an offense known to the law, then the defendant is entitled to his discharge. The court derives jurisdiction from the law and its jurisdiction extends to such matters as the law declares criminal and no other and when it undertakes to imprison for an offense to which no criminality is attached, it acts beyond its jurisdiction* (citing numerous decisions including Federal cases)."

In *Ex parte Ballard,* 223 S. W. 222 (Texas), after conviction, petitioner sought a writ of habeas corpus on the ground that the indictment charged an innocent act. The court says in part:

"Relator contends that the facts pleaded against him in the information, if true, did not constitute a violation of any law of this state, and that, under such state of case, the judgment would be a nullity. In Bishop's New Practice, Vol. 2, para-

graph 1410, it is said: 'Where the allegation against an indicted or convicted prisoner discloses no crime, it seems to follow that he may be set at liberty on this writ.' * * *

"We do not deem the above to be in any wise in conflict with the statement of some of the courts that habeas corpus will not lie to test the sufficiency of a complaint or indictment. An examination of those decisions so holding will, we think, invariably disclose a refusal by the courts of an application for a writ, when it is sought for the purpose of securing a ruling of the higher court in advance of a hearing in the trial court; or where the errors complained of are mere irregularities or defects in form. * * * *When the contents of the indictment, if admittedly true, charge no offense, the trial court is without jurisdiction to render a judgment and such judgment, if entered, would be a nullity. It is as though, upon no pleading, the court assumed power to render a judgment. We know of no authority holding the contrary to what we have just stated.*

"It is said in 21 Cyc. page 296 that want of jurisdiction over person or subject-matter is always a ground for relief by habeas corpus for, if the court has acted without jurisdiction, its judgments or orders are absolutely void, even on collateral attack. Jurisdiction of the person of the accused *or of the class of offenses sought to be charged is not sufficient but there must be such jurisdiction as gives to the court the power and right to hear and determine the particular matter and to render the particular judgment.*"

(c)

In re Coy, 127 U. S. 731. Petitioner was tried, found guilty and sentenced. The court says:

> "The petitioners also present a copy of the indictment attached to their petition which they say charges no offense against the United States and that the Federal District Court and the Grand Jury thereof had no jurisdiction in the premises * * *. The proposition is founded not upon any want of jurisdiction of the person but upon the broad statement that the indictment presents no crime or offense under the laws of the United States. The indictment itself is of considerable length, although consisting of but one count. It reads as follows:"

The court, after setting out the indictment, proceeds to take up the various objections of petitioner to same and, by an examination of the case, it will be seen that the objections there made by petitioner to the indictment were not such as showed that the indictment charged him with an innocent act but were objections going to the indictment in its sufficiency as a legal pleading and involving questions only properly to be considered on motion to quash or demurrer and not involving a colorless or impossible offense. The court in that situation applied the rule laid down in *Ex parte Watkins*, 3 Pet. 193 and *Ex parte Parks*, 93 U. S. 18, and other cases that, in habeas corpus, where the indictment is attacked, the inquiry in such case is not whether there is in the indictment such specific allegation of the details of the charge as would make it good on demurrer, but whether the indictment describes a class of offenses of which the court has jurisdiction. This court there con-

sidered and found the indictment did charge a crime. After quoting the language of Chief Justice Marshall in *Ex parte Watkins, supra,* the court makes this statement, which is very significant:

> "It may be said that this language is too broad in asserting that, because every court must pass upon its own jurisdiction, such decision is itself the exercise of a jurisdiction which belongs to it and cannot, therefore, be questioned in any other court. *But we do not so understand the meaning of the court.* It certainly was not intended to say that, because a Federal Court tries a prisoner for an ordinary common-law offense, as burglary, assault and battery or larceny, with no averment or proof of any offense against the United States or any connection with a statute of the United States and punishes him by imprisonment, he cannot be released by habeas corpus because the court which tried him had *assumed* jurisdiction."

The foregoing case was cited and quoted from twice by Judge Pollock as sustaining our contentions in deciding this matter.

(d)

Greene v. *Henkel,* 183 U. S. 249, was an application for a writ of habeas corpus in a removal case. This court there, speaking by Mr. Justice Peckham, said:

> *"We do not, however, hold, that when an indictment charges no offense against the laws of the United States,* and the evidence given fails to show any, or if it appear that the offense charged was not committed or triable in the district to which the removal is sought, the court would be justified in ordering the removal, and thus

> subjecting the defendant to the necessity of making such a defense in the court where the indictment was found. *In that case there would be no jurisdiction* to commit nor any to order the removal of the prisoner."

In *Henry* v. *Henkel,* 235 U. S. 219, also a removal case, this court, after setting out the rule that, where the offense is one of a class of offenses of which the court has general jurisdiction, that no inquiry will be made as to the jurisdiction of the court on habeas corpus, says:

> *"The cases cited do not, of course, lead to the conclusion that a citizen can be held in custody or removed for trial where there was no provision of the common law or statute making an offense of the acts charged. In such cases* the committing court would have *no jurisdiction,* the prisoner would be in custody without warrant of law and therefore *entitled to his discharge."*

In *Pierce* v. *Creecy,* 210 U. S. 387, an extradition case where habeas corpus was sought, this court says:

> "Here the only condition which is insisted is absent, is the charge of a crime. The only evidence of a charge of crime is the indictment, and the contention to be examined is that the indictment is insufficient proof that a charge has been made.
>
> "The counsel for the petitioner disclaimed the purpose of attacking the indictment as a criminal pleading, appreciating clearly that the point is not whether the indictment is good on sufficiency, or over seasonable challege, to bring the accused to the bar for trial. *Counsel concede that they cannot successfully attack the indictment except by showing that it does not charge a crime. The distinction between these two kinds of attack though narrow is clear."*

We fail to see why the reasoning and language of this court in the three cases last quoted from is not thoroughly applicable to the question here involved. The considerations there made were not made under any special law not now involved and, moreover, their applicability is in accordance with reason and all clearly hold that where the indictment charges a colorless and impossible offense no jurisdiction exists.

(e)

In *Goto* v. *Lane*, 44 Supreme Court Reporter, 525, decided June, 1924, which is the latest case touching the subject in any way, application for habeas corpus after conviction was sought, one of the grounds being that the use of the disjunctive "or" rendered the indictment so uncertain that it did not meet the requirements of the constitution. This court says that the construction to be put on the indictment, its sufficiency and the effect to be given to the stipulation were all matters, the determination of which rested primarily with the trial court and, if it erred in determining them, its judgment was not for that reason void. But this court makes this further important statement, clearly recognizing that an indictment may not charge any offense so as to give jurisdiction, saying:

> "The offense charged was neither colorless nor an impossible one under the law."

(f)

Ex parte Lange, 18 Wall. (U. S.) 163, petitioner after conviction sought habeas corpus. The sentence

was that petitioner should pay a $200.00 fine which was paid.

The court then set aside the sentence of a fine and rendered one of imprisonment, petitioner contending the court could only impose a fine *or* imprisonment for the offense, and could not do both asked for the writ. This court granted the writ, saying:

> "A judgment may be erroneous and not void and it may be erroneous because it is void. * * * We are of the opinion that, when the prisoner, as in this case, by reason of a valid judgment, had suffered one of the alternative punishments, *to which alone the law subjected him, the power of the court to punish further was gone.* * * * The records of the court's proceedings at the moment the second sentence was rendered, showed that, in that very case and for that very offense the prisoner had fully performed, completed and endured one of the alternative punishments which the law prescribed for that offense and had suffered five days' imprisonment on account of the other. *It thus showed the court that its power to punish for that offense was at an end.* Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common-law by the protection of personal rights in that regard are a nullity, the authority of the court to punish the prisoner was gone. The *power* was exhausted; its further exercise was prohibited. It was error, but it was error because the *power to render any further judgment did not exist.*
>
> It is *no answer* to this to say that the court had *jurisdiction of the person* of the prisoner *and of the offense* under the statute. It, *by no means, follows that these two facts make valid,* however erroneous it may be, *any judgment* the court may render in such case. If a justice of the peace, hav-

> ing jurisdiction to find for a misdemeanor and with the party charged properly before him, should render a judgment that he be hung, it would simply be *void*. Why void? Because he had *no power to render such a judgment*. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death or confiscation of property, it would, for the same reason, be void."

In the instant case the court did not exhaust its power to punish but it had no power in the first instance to punish because no crime had been committed. What is the difference in principle? Whether the lack of jurisdiction is because it has been exhausted or because none ever existed is equally the same—no jurisdiction existed to render the particular judgment and the same may be relieved against in habeas corpus.

In *Ex parte Baine*, 121 U. S. 1, petitioner was tried and convicted on an indictment found by a Grand Jury, which indictment, before trial began, had several words added to it by the court. Petitioner applied for the writ contending he could only be tried on indictment of a Grand Jury and that an indictment thus amended was not such an indictment as the law contemplated and any act of the court punishing him pursuant thereto was without jurisdiction and void. This court sustained his contention saying:

> "It only remains to consider whether this change in this indictment *deprives the court of the power of proceeding* to try the prisoner and sentence the prisoner as provided in the statute. We have no difficulty in holding that the indictment on which he was tried was *no indictment of a grand jury*. The decisions which we have already re-

ferred to, as well as sound principle, require us to hold that if the indictment was changed it was no longer the indictment of the grand jury who repsented it. *Any other doctrine would place the rights of the citizen* which were intended to be protected by the constitutional provision at the *mercy or control of the court* or prosecuting attorney; for if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the constitution places upon the power of the court in regard to the prerequisite of an indictment in reality no longer exists. *It is of no avail under such circumstances to say that the court still has jurisdiction of the person and of the crime;* for though it has possession of the person and would have jurisdiction of the crime if it were properly presented by indictment, the jurisdiction of the offense is gone and the court has no right to proceed any further in the progress of the case for want of an indictment. *If there is nothing before the court which the person in the language of the constitution can be held to answer, he is then entitled to be discharged* so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or *nolle prosequi* had been entered. *There was nothing before the court on which it court hear evidence or pronounce sentence."*

An indictment which charges no offense known to the law surely does not furnish any better basis for the judgment of the court than an indictment which charges an offense known to the law and which is criminal, but which indictment, since returned, has been amended in

some respect. This court, in the foregoing case, well pointed out that it was of no avail to say that the court had jurisdiction of the person and of the crime, but that the jurisdiction of the particular offense was gone for want of an indictment. Now the indictment here is the same as no indictment because what it sets out to be a crime is, under our law, no crime. There was nothing before the District Court that accepted the plea of guilty of the petitioner and sentenced him, upon which it could lawfully impose any sentence and, by all the reasoning of this court in the foregoing case, its judgment sentencing him was without power and jurisdiction.

In Hans Nielson, petitioner, 131 U. S. 176, petitioner had been indicted, found guilty and sentenced on what he contended was a second trial and judgment for the same offense, for which he had previously been found guilty and punished. This court, speaking by Mr. Justice Bradley, says:

> "The objection to the remedy of habeas corpus, of course, would be that there was in force a regular judgment of conviction which could not be questioned collaterally as it would have to be on habeas corpus. But there are *exceptions to this rule* which have more than once been acted upon by this court. It has been *firmly established* that if the court which renders a judgment *has not jurisdiction* to render it, either because the proceedings or the law under which they are taken, are unconstitutional *or for any other reason, the judgment is void* and may be questioned collaterally and a defendant who is imprisoned under and by virtue

of it may be discharged from custody on habeas corpus.

* * * * * * *

"It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights than *an unconstitutional conviction and punishment under a valid law.* In the first case it is true the court has no authority to take cognizance of the case; but *in the other it has no authority to render judgment against the defendant.* * * * A party is entitled to a habeas corpus not merely where the court is without jurisdiction of the cause but *where it has no constitutional authority or power to condemn the prisoner.* As said by Chief Baron Gilbert in a passage quoted in *Ex parte Parks,* 93 U. S. 18, 'If the commitment be against law as being made by one who had no jurisdiction of the cause or *for a matter for which by law no man ought to be punished, the courts are to discharge.*' This was said in reference to cases which had gone to conviction and sentence. Lord Hale laid down the same doctrine in almost the same words. 2 Hale's Pleas of the Crown 144. And why should not such a rule prevail in *favorem libertis? If we have seemed to hold the contrary in any case it has been from inadvertence.*"

The last sentence in the above quotation is of peculiar significance, following as it does the reference to *Ex parte Parks,* 93 U. S. 18, relied upon by the Government in this case.

If it was outside of the power and jurisdiction of the court to punish Hans Nielson a second time for the same offense, is it not also outside the power and jurisdiction of the court to punish Isadore Luvisch for no offense whatever? It is difficult to see why punishment

contrary to an express constitutional provision is more violative of a person's constitutional rights, than punishment contrary to the inherent provisions of the Constitution and all our law, viz., that one shall not be punished for that which is not a crime.

(g)

We come now to consider the two cases cited and relied on by the government, *Matter of Gregory*, 219 U. S. 210 and *Glasgow* v. *Moyer*, 225 U. S. 420. The Gregory case supports the petitioner's contentions in every respect. The petitioner there had been charged in the police court of the District of Columbia, with violating a certain statute of the District of Columbia, relating to trading stamps. After a judgment of guilty and sentence, application was made for a writ of habeas corpus. The ground upon which the petitioner challenged the legality of his punishment was *that the statute was unconstitutional*. This court says by Mr. Justice Hughes:

> "The only question before us is whether the police court had jurisdiction. A *habeas corpus* proceeding cannot be made to perform the function of a writ of error and we are not concerned with the question whether the information was sufficient or whether the acts set forth in the agreed statement constituted a crime, that is to say, whether the court properly applied the law, if it be found that the court had jurisdiction to try the issues and to render the judgment. * * *
>
> "We come then to the grounds upon which the jurisdiction of the police court is assailed. It is urged that the prohibition contained in the statute

> under which the information was brought is unconstitutional, in that it violates the Fifth Amendment of the Constitution of the United States by depriving the petitioner of liberty and property without due process of law." * * *

After consideration of the question of the constitutionality of the statute, this court says:

> "We have then a statute with valid operation. This being established there can be no question that it conferred upon the police court, by its express terms, jurisdiction of the offense, and that court tried and convicted the petitioner.
>
> "But it is insisted that the facts do not support the conviction. The argument ignores the nature of this proceeding, *unless it be meant that no colorable question was presented; that on the agreed statement of facts and viewing the statute as prohibiting transactions involving the element of chance, there was such an obvious and palpable want of criminality that the judicial judgment cannot be said to have been invoked, and that therefore the court had no jurisdiction to determine whether or not the statute had been violated.*
>
> "Such a contention is without merit. *It is by no means manifest that the scheme* or enterprise in which the petitioner was engaged *lay outside the range of judicial consideration under the statute.* On the contrary, the agreed statement of facts presented questions requiring the exercise of judicial judgment, and the case falls within the well established rule."

What did this court mean when it said that the contention of the petitioner, Gregory, that the facts did not support the conviction was untenable "unless it be meant that no colorable question was presented," and, when it

said unless "there was such an obvious and palpable want of criminality that the judicial judgment cannot be said to have been invoked, and that therefore the court had no jurisdiction to determine whether or not the statute had been violated," if it did not mean and concede that there could be an indictment or an agreed state of facts so wholly free from criminality as not to give the court jurisdiction to impose any sentence? That this is the clear and undeniable meaning of the court is conclusive from its further statement that "It is by no means manifest that the scheme or enterprise in which the petitioner was engaged lay outside the range of judicial considerations under the statute." This supports contention of petitioner in this case that, where an indictment charges merely an innocent act a colorless and impossible crime, that the jurisdiction of the trial court is not invoked and its sentence is void and may be attacked in *habeas corpus*. The Gregory case, instead of being an authority for the position of the government, is an authority directly and squarely supporting the contention of the petitioner.

From the statement of the court in the Glasgow case it appears petitioner there had sought the writ before trial on the same grounds. It is apparent the decision turns not on the question of the right to consider the matters there raised in *habeas corpus* but because the court had on the previous application instructed and directed petitioner how to proceed to avail himself of the questions raised and he had disregarded these directions and the court therefore on his second application for the

writ said that "having remitted him to a writ of error as a remedy it would be a contradiction of the ruling, he not having availed himself of the remedy, to permit him to prosecute *habeas corpus.*"

This case of *Glascow* v. *Moyer,* as we understand it, does not hold that the court can not discharge in habeas corpus proceedings one who pleaded guilty to an indictment charging a colorless and an impossible offense. That point was not raised in the case, for on pages 427 and 428, the court sets out the assignments of error and the other questions raised in the petition filed in the court below, and a reading of the assignments of error and of the points presented, do not include the question now before the court in the instant case.

It is true this court held that in a habeas corpus proceeding, after conviction, the court will not consider the question of whether or not the act creating the crime is constitutional. But that is not the question in the instant case. If this court had declared an act creating a crime unconstitutional, and afterwards a court not knowing of the action of this court, had permitted an indictment to be returned charging one with the crime under the law which had already been declared unconstitutional, and the party so charged had pleaded guilty and had been sentenced, then we, in our opinion, would have a question similar to the one in the instant case: for there can be no difference between pleading guilty to an indictment that charges a colorless and an impossible offense, and pleading guilty to an indictment charging a crime under an act which had already been declared

unconstitutional. The Glascow case is utterly without application in this case.

In this case petitioner attacks the jurisdiction of the District Court over the purported cause of action, on the ground that the same is not a crime and is a colorless and impossible offense under the law. If such an objection does not go directly to the jurisdiction and power of the court to sentence and punish, then it is indeed hard to conceive what objections do reach the jurisdiction of the court.

The whole question resolves itself into whether or not the court is going to put procedure above the fundamental rights of the citizen. Just because Luvisch plead guilty to something that was not a crime, a colorless and impossible offense under the law and by all the law should not spend the next four years in the penitentiary, is there not a remedy open to him? If he had plead guilty to counterfeiting the Declaration of Independence no one would contend he had been guilty of any crime, yet having pleaded guilty, is this court going to leave him spend the other four years of his five year sentence in the penitentiary just because he might have sued out a writ of error.

Respectfully submitted,

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In conformity with the suggestion of Mr. Chief Justice Taft made from the bench during oral argument, we are attaching to this brief an appendix showing the memorandum decisions of Judge John C. Pollock on the motion to dismiss herein and on the application for writ of *habeas corpus*. The decision of the Court of Appeals, Eighth Circuit and the dissenting opinion of Judge Lewis, will be found in 287 Federal, 699.

APPENDIX.

In the District Court of the United States for the District of Kansas, First Division. In re Petition Isadore Luwisch, for Writ of Habeas Corpus. No. 2339.

Memoranda of Decision on Motion to Dismiss.

Petitioner, with others, was indicted on three counts in the Eastern District of Michigan, charged with violations of Section 161 of the Penal Code, which reads:

> "Whoever, within the United States or any place subject to the jurisdiction thereof, except by lawful authority, shall have control, custody, or possession of any plate, stone or other thing, or any part thereof, from which has been printed or may be printed any counterfeit note, bond, obligation, or other security, in whole or in part, of any foreign government, bank or corporation, or shall use such plate, stone or other thing, or knowingly permit or suffer the same to be used in counterfeiting such foreign obligations, or any part thereof; or whoever shall make or engrave, or cause or procure to be made or engraved, or assist in making or engraving, any plate, stone or other thing, in the likeness or similitude of any plate, stone or other thing designated for the printing of the genuine issues of the obligations of any foreign government, bank, or corporation, or whoever shall print, photograph, or in any other manner make, execute, or sell, or cause to be printed, photographed, made, executed or sold, or shall aid in printing, photographing, making, executing, or selling, any engraving, photograph, print, or impression in the likeness of any

> genuine note, bond, obligation, or other security, or any part thereof, of any foreign government, bank, or corporation; or whoever shall bring into the United States or any place subject to the jurisdiction thereof, any counterfeit plate, stone, or other thing, or engraving, photograph, print, or other impressions of the notes, bonds, obligations, or other securities of any foreign government, bank or corporation, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

On a plea of guilty he was sentenced to serve a term of five years imprisonment in the Federal Penitentiary at Leavenworth and pay a fine of five thousand dollars. Being confined under this judgment he brings this application for release on writ of *habeas corpus*.

The warden in charge of the prison, as respondent, moves to dismiss the petition for the reason on its face it presents no ground justifying the granting of the writ prayed for discharging petitioner.

The question sought to be raised and discussed on the motion to dismiss is this:

The indictment to which petitioner entered his plea of guilty, and on which judgment was pronounced against him, charges no offense under any law of the United States giving the court any jurisdiction or power to pronounce the judgment against him which was pronounced.

While the indictment is intended to charge petitioner with three several offenses under said Section 161 of

the Penal Code above quoted, whether in point of law any offense was in fact committed by him as charged in the indictment must be determined by taking the law, in one hand, and the acts charged to have been done by him to which he has confessed, in the other, and if when so considered no violation of the law appears, then the court had no offense to try or determine, the plea of guilty entered thereon admits no wrong done in violation of the law, and the judgment of conviction has no foundation on which to stand. To this extent go all the controlling authorities on this subject.

In re Coy, 127 U. S. 731, it is said:

> "The writ of *habeas corpus,* in case of a person held a prisoner by sentence of court, can only release the prisoner when it is shown that the court had no jurisdiction to try and punish him for the offense. The inquiry in such case is not whether there is in the indictment such specific allegation of the details of the charge as would make it good on demurrer, but whether the indictment describes a class of offenses of which the court has jurisdiction, and alleges the defendant to be guilty. If the record of the case in which judgment of imprisonment is pronounced contains no charge of such offense, he should be discharged."

In *Ex parte Parks,* 93 U. S. 23, it is said:

> "The court will look into the proceedings so far as to determine this question. If it finds that the court below has transcended its powers, it will grant the writ and discharge the prisoner, even after judgment."

In *Roberts* v. *Riley,* 116 U. S. 80, Mr. Justice Matthews delivering the opinion for the court, says:

> "The court must find that the petitioner is substantially charged with a crime against the laws of the United States. This is a question of law and is always open upon the face of the papers to judicial inquiry on an application for discharge on a writ of *habeas corpus.*"

In 12 R. C. L., p. 1203, it is said:

> "Thus it has been held that when the facts charged or attempted to be charged, do not constitute any public offense the defendant will be discharged as this goes to the jurisdiction of the court."

The question presented on this application therefore is this: Is the paper or "inland excise stamp" described in the several counts of the indictment, if genuine, as a matter of law such an obligation or security of the Dominion of Canada as is contemplated by the law-making power of the enactment of Section 161 of the Penal Code? If so, petitioner violated the law, by his plea of guilty confessed such violation, and is justly undergoing punishment. On the other hand, if the paper described in the indictment as an "inland excise stamp" does not, if genuine, in any just sense, fall within the general classification made by the law-making power in the enactment of said Section 161, it then follows the act of defendant admitted by him to have been done by his plea of guilty entered, confesses no violation of the law for which there was any jurisdiction or power in the court to punish him, and he must be released.

Now, while the law-making power has in Section 147 of the Code defined what constitutes an "obligation or other security of the United States" the Congress has not attempted the making of any definition or classification of the obligations or securities of a foreign government for reasons perfectly obvious, leaving any such definition to be either gathered from the commonly accepted meaning of the terms employed or to be arbitrarily defined as the law-making power of such foreign government might desire to provide in its laws. This being true, I am inclined to the opinion at this time the paper described in the indictment as an "inland excise stamp" constitutes in no just sense either an obligation or other security of the Dominion of Canada within the generally accepted meaning of these terms. However, this case comes before the court on a mere motion to dismiss the petition, on the hearing of which all matters in the petition well pleaded are confessed by respondent. It may be true, as a fact, the law-making power of the Dominion of Canada has described or classified her obligations and securities or by law prescribed their nature. If so, manifestly, it was the intent of the law-making power of our government in affording protection against the counterfeiting of the securities and obligations of foreign government to adopt the meaning placed on those terms by the foreign government sought to be defrauded by the acts done within this country. If so, such definitions, if any, as are by the law of such foreign country made should be here construed as the local law of such country is construed. Now, as the law of such foreign

country, if any, is not pleaded in the indictment in this case, and as in my judgment the "inland excise stamp" described therein is neither a security nor obligation in the common and generally accepted meaning of those terms, and as the judgment of conviction is shown by the record to rest upon the charges in the indictment and the admission of their doing by defendant, and as the indictment charges the same to be securities or obligations of the Dominion of Canada, the motion to dismiss must be denied and the respondent directed, if so advised by his counsel, to answer the petition within twenty days from this date in order that the facts as to the existence of any such foreign laws, if any may be investigated.

It is so ordered.

JOHN C. POLLOCK, *Judge.*

Kansas City, Kansas,
February 25, 1922.

Endorsed: No. 2339 In Re Isadore Luvisch, Habeas Corpus. Memo. of Decision denying Motion to Dismiss and directing Respondent to answer in 20 days. Filed Feb. 25, 1922 F. L. Campbell, Clerk.

In the District Court of the United States for the District of Kansas, First Division. In the Matter of the Petition of Isadore Luvisch, for Writ of Habeas Corpus.

Order Denying Motion to Dismiss.

Now on this 25th day of February, 1922, the above matter comes on for consideration on respondent's motion to dismiss the petition filed herein, and, the court

having examined the pleadings, briefs of counsel, and being well advised in the premises, finds said motion to dismiss should be, and the same is hereby denied, for reasons set forth in the memoranda of decision this day filed.

It is further ordered, respondent, if so advised by counsel, file his answer to the petition herein, within twenty days from this date. To which order and ruling of the court respondent excepts.

United States of America, District of Kansas, ss.

I, F. L. Campbell, Clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the within and foregoing to be a true, full, and correct copy of memo of decision on motion to dismiss and order denying motion to dismiss in Case No. 2339, entitled In the Matter of the Petition of Isadore Luvisch, for Writ of Habeas Corpus, in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said District of Kansas, this 27th day of February, 1922.

F. L. Campbell, Clerk,
(Seal) By C. B. White, Deputy Clerk.

In the District Court of the United States for the District of Kansas, First Division. In re Isadore Luvisch, Application for Writ of Habeas Corpus. No. 2339.

Memoranda of Decision on Application for Writ of Habeas Corpus.

Petitioner was indicted in the Eastern District of Michigan on three counts charged with violation of Section 161 of the Penal Code, plead guilty to the charges and was by the court sentenced to serve five years imprisonment in the Federal Prison at Leavenworth in this state, where, being confined by the warden of the prison, in pursuance of such judgment, he brings this application for release on writ of habeas corpus.

The warden has filed his response and the matter is now before the court for decision.

The question presented is, does the indictment or any count thereof found against petitioner charge him with a violation of any law of this Government? If not it is quite clear the court had no jurisdiction. The plea of guilty interposed by petitioner to such indictment admitted no wrong or guilt on his part and the sentence imposed against him is void.

On a former hearing it was attempted to be made clear if an indictment absolutely fails to charge any public offence the court to which it is presented has no jurisdiction. See, *In re Coy*, 127 U. S. 731; *Ex Parte Parks*, 93 U. S. 23; *Roberts* v. *Riley*, 116 U. S. 80; 12 R. C. L. p. 1203.

The charges attempted to be preferred against petitioner herein in the indictment returned against him are the offenses of counterfeiting in whole or in part a "note, bond obligation or other security" of a foreign country, the Dominion of Canada. While the indict-

ment does inferentially charge petitioner with the counterfeiting of an alleged security of the Candian Government, yet the indictment further proceeds to specify and describe with minuteness the instrument alleged to have been counterfeited by petitioner. Hence it becomes a question of law whether the falsely making, uttering or other counterfeiting of such an instrument as is described is an act done in violation of the provisions of Section 161 of the Penal Code under which he was indicted. It is quite evident by Section 161 of the Penal Code the Congress did not attempt to afford protection against or to punish the counterfeiting of all and every class of papers, tokens or documents made up or printed by or in a foreign government, but alone to securities or obligations of such countries or a bank or corporation located therein. The question presented in its last analysis here is:

Do the inland excise stamps described in the indictment fall within the class of documents named in the statute as a "note, bond, obligation or other security"? If this question related to an instrument of this government, the answer would be easy to find for the Congress has by law arbitrarily defined in what securities or obligations of this government consist, as follows:

> "Section 147. The words 'obligation or other security of the United States' shall be held to mean all bonds, certificates of indebtedness, national-bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts

> for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress."

However, the Congress has not attempted to define in what the "notes, bonds, obligations or other securities" of foreign governments consist. Section 220 of the Penal Code was enacted for the purpose of making it an offense to counterfeit the postage stamps of a foreign government. The inland excise stamps described in the indictment cannot in any sense fall within that statute. Therefore, as there is no statutory definition of the term "note, bond, obligation or other security" employed in Section 161 of the Penal Code, and as a mere stamp or receipt does not in my judgment fall within the commonly accepted meaning of the term "note, bond, obligation or other security" I am of the opinion the indictment alleges no public offense against petitioner as to either or any of its counts. While perhaps this court will not take judicial notice of the laws of a foreign country, and while it was within the power of the Canadian Government by arbitrary law to have defined in what its "notes, bonds, obligations or other securities" should consist, a search of the laws of that country reveals no act making such arbitrary definition of such terms.

While I find no adjudicated cases in point an examination of the opinions of the Attorney-Generals on kindred or like subjects aid me in arriving at the view of the matter here taken. See, 14 Op. Atty. Gen. 528;

21 Op. Atty. Gen. 136; 22 Op. Atty. Gen. 40; 26 Op. Atty. Gen. 231.

I am of the opinion the writ prayed must go, on such terms as to bond as this court, on application, shall prescribe.

It is so ordered.

JOHN C. POLLOCK, *Judge.*

Kansas City, Kansas,
April 20th, 1922.

A true copy; attest:

F. L. Campbell, Clerk,
(Seal) By C. B. White, Deputy.